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Nos. 85-954, 85-955

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

JAPAN WHALING ASSOCIATION, *et al.*,
Petitioners,
v.
AMERICAN CETACEAN SOCIETY, *et al.*,
Respondents.

MALCOLM BALDRIGE, *et al.*,
Petitioners,
v.
AMERICAN CETACEAN SOCIETY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for The District of Columbia Circuit

BRIEF FOR PETITIONERS JAPAN WHALING ASSOCIATION, *ET AL.*

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QUESTIONS PRESENTED

1. Whether domestic statutes require the Secretary of Commerce to determine and certify that, because Japanese nationals are taking certain species of whales in excess of international quotas by which Japan is not bound because it filed formal objections to them, the Japanese nationals are diminishing the effectiveness of the international convention under which the quotas were established, even though Japan has agreed with the United States (a) to withdraw, irrevocably, its formal objections to the quotas, (b) to limit its harvest of whales to numbers that scientific evidence indicated to the Secretary's satisfaction would not endanger the species of whales in question, and (c) to cease commercial whaling operations in 1988, which is two years later than when quotas established under the international convention will reach zero for all species of whales.

2. Whether a federal court may and, if it may, whether in the circumstances of this case it should order a Cabinet officer to make a determination and certification under a statute phrased generally and ambiguously when the result of the certification would be to breach an agreement between the United States and a friendly foreign nation and to impose severe punitive sanctions on that nation and its nationals.

THE PARTIES

The petitioners named in the captions were defendant-intervenor and defendant and appellants below. In addition, Japan Fisheries Association and Secretary of State George P. Shultz were defendant-intervenor and defendant, respectively, and appellants below. The plaintiffs and appellees below, respondents in this Court, are, in addition to the American Cetacean Society, the Animal Protection Institute of America, Animal Welfare Institute, Center for Environmental Education, Connecticut Cetacean Society, Defenders of Wildlife, Friends of the Earth, The Fund for Animals, Greenpeace U.S.A., Thomas Garrett, The Humane Society of the United States, International Fund for Animal Welfare, and The Whale Center.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND TREATIES INVOLVED	2
STATEMENT	3
The Convention And Whale Quotas	3
The United States Statutes	6
The Murazumi-Baldrige Agreement	8
The Proceedings Below	11
Interim Whaling By Japan	13
SUMMARY OF ARGUMENT	14
ARGUMENT	18
I. THE PELLY AND PACKWOOD-MAGNUSON AMENDMENTS DO NOT REQUIRE THE SECRETARY OF COMMERCE TO CERTIFY AUTOMATICALLY ANY NATION WHOSE CITIZENS TAKE WHALES IN EXCESS OF AN IWC QUOTA	21
A. The Plain Meaning Of The Statutory Language Grants Discretion To The Secretary Whether To Certify	21

B. The Legislative History Confirms That The Secretary Has Discretion Under The Statutes..... 23

C. Deference Is Owing To The Secretary's Reasonable Construction Of The Statutes He Administers..... 27

D. An Interpretation Of The Statutes As Imposing On The Secretary A Ministerial Duty To Certify Any Taking In Excess Of IWC Quotas Unnecessarily Raises A Serious Constitutional Question Concerning Unlawful Delegation Of Power..... 28

II. THE STATUTES SHOULD NOT BE READ AS REQUIRING THE IMPOSITION OF SANCTIONS AGAINST A NATION THAT HAS EXEMPTED ITSELF FROM THE INTERNATIONAL REQUIREMENT THAT THE SANCTIONS ARE INTENDED TO ENFORCE..... 32

A. An Interpretation Of The Statutes As Applying To A Party That Has Exempted Itself From An IWC Quota Improperly And Unnecessarily Creates A Conflict Between The Statutes And The ICRW... 33

B. The Imposition Of Sanctions Against Japan Would Result In Violation Of International Law..... 36

C. Coercion Of Signatories To Abstain From Exercising Article V-3 Rights Conflicts With Established United States Foreign Policy..... 40

III. COMMANDING THE EXECUTIVE TO DISHONOR AN INTERNATIONAL AGREEMENT SUCH AS THE MURAZUMI-BALDRIGE AGREEMENT EXCEEDS PRUDENTIAL AND EQUITABLE LIMITATIONS ON JUDICIAL AUTHORITY.. 42

A. Giving A Command To An Official Of The United States To Dishonor An International Agreement Is Beyond The Authority Of United States Courts..... 42

B. A Judicial Command To Dishonor An International Agreement And To Impose Severe Sanctions On Nationals Of A Friendly Nation For Conduct Authorized By The Agreement Is An Abuse Of The Court's Equity Powers..... 45

CONCLUSION..... 50

APPENDICES

A. International Convention For The Regulation Of Whaling..... 1a

B. Pelly Amendment, 22 U.S.C. §1978(a)..... 4a

C. Packwood-Magnuson Amendment, 16 U.S.C. §1821(e)(2)..... 7a

D. Proposed Packwood Amendment To The Packwood-Magnuson Amendment Rejected By House-Senate Conference Committee, and Accompanying Letter Of Congressman Fascell, Chairman, House Committee on Foreign Affairs..... 9a

E. Excerpt From Transcript Of The Treaty Negotiation Of The International Convention For The Regulation Of Whaling..... 13a

TABLE OF AUTHORITIES

CASES

A.L.A. Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935)..... 29-31

Ashwander v. *TVA*, 297 U.S. 288 (1936)..... 32

Baker v. *Carr*, 369 U.S. 186 (1962)..... 17,43

Carter v. *Carter Coal Co.*, 298 U.S. 238 (1936)..... 29

Chemical Manufacturers Association v. *Natural Resources Defense Council*, 105 S. Ct. 1102 (1985)..... 27

Chevron, U.S.A. v. *Natural Resources Defense Council*, 104 S. Ct. 2778 (1984)..... 15,27

Chew Heong v. *United States*, 112 U.S. 536 (1884)..... 33-34

FEC v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27 (1981)..... 27

Fisheries Case (U.K. v. Norway), 1951 I.C.J. 116..... 39

Harrisonville v. *W.S. Dickey Clay Manufacturing Co.*, 289 U.S. 334 (1933)..... 45-46

Hartford Empire Co. v. *United States*, 323 U.S. 386 (1945)..... 48

Hecht Co. v. *Bowles*, 321 U.S. 321 (1944).... 45, 48,49

Industrial Union Department v. *American Petroleum Institute*, 448 U.S. 607 (1980)..... 30

Johnson v. *Eisentrager*, 339 U.S. 763 (1950)... 43

Jordan v. *Tashiro*, 278 U.S. 123 (1928)..... 37

Moser v. *United States*, 341 U.S. 41 (1950).... 49

National Cable Television Association v. *United States*, 415 U.S. 336 (1974)... 31

Oetjen v. *Central Leather Co.*, 246 U.S. 297 (1918)..... 42-43

Panama Refining Co. v. *Ryan*, 293 U.S. 388 (1935)..... 29-31

Regan v. *Wald*, 82 L. Ed. 2d 171 (1984)..... 43

Pigeon River Improvement, Slide & Boom Co. v. *Charles W. Cox, Ltd.*, 291 U.S. 138 (1934)..... 34

The Chinese Exclusion Case, 130 U.S. 581 (1889)..... 29

Train v. *Natural Resources Defense Council*, 421 U.S. 60 (1975)..... 27

Trans World Airlines v. *Franklin Mint Corp.*, 466 U.S. 243 (1984)..... 16,33

Tucker v. *Alexandroff*, 183 U.S. 424 (1902).. 37

United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)..... 43

Weinberger v. *Romero-Barcelo*, 456 U.S. 305 (1982)..... 45-46

Whitehouse v. *Illinois Central Railroad*, 349 U.S. 366 (1955)..... 46

Will v. *United States*, 389 U.S. 386 (1967)..... 48

STATUTES, TREATIES AND EXECUTIVE AGREEMENTS

Article 26 of the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, *entered into force* Jan. 27, 1980, U.N. Doc. A/Conf. 39/27, *reprinted in* 63 Am. J. Int'l L. 875 (1969)..... 38

International Convention for the Regulation of Whaling, *opened for signature* Dec. 2, 1946, 62 Stat. 1716, 161 U.S.T. 72, T.I.A.S. No. 1949..... 2,3-4

Pelly Amendment to the Fishermen's Protective Act, 85 Stat. 768, 22 U.S.C. § 1978(a)..... 2,6-7 21-23

Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act, 90 Stat. 337, 16 U.S.C. § 1821(e)(2)..... 2,7, 21-23

Murazumi-Baldrige Agreement..... 2, 8-10

OTHER

Bureau of Public Affairs, U. S. Dep't of State, Current Policy No. 4156..... 41

Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953)..... 39-40

117 Cong. Rec. 34752 (1971)..... 35

125 Cong. Rec. 21743, 22082-83 (1979)..... 35

Hearings Before the Subcommittee on Fisheries and Wildlife and the Environment of the House Committee on Merchant Marine and Fisheries, 96th Cong., 1st Sess. 314-17 (1979) (statements of Cong. Breaux)..... 24-25

Letter from Congressman Dante B. Fascell, Chairman of House Committee on Foreign Affairs, to Congressman Mervyn M. Dymally (Sept. 6, 1984)..... 26

Presidential Signing Statement, 15 Weekly Comp. Pres. Doc. 1435 (Aug. 15, 1979)..... 25

Proposed Packwood Amendment to Packwood-Magnuson Amendment, S. 2463, 98th Cong., 2d Sess. (1984)..... 26

Restatement of Foreign Relations Law §§ 131, 134 (Draft. No. 6, 1985)..... 34, 38-39

S. Exec. Doc. L., 92d Cong., 1st Sess. (1971)..... 38

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BRIEF FOR PETITIONERS JAPAN WHALING ASSOCIATION, *ET AL.*

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals are reported at 768 F.2d

426 and appear in the separately printed appendix to the petition in No. 85-955 (1a-55a). The district court opinion is reported at 604 F. Supp. 1398 and also appears in the separately printed appendix to the petition in No. 85-955 (56a-84a).[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. 90a-91a) was entered on August 6, 1985. Timely petitions for rehearing and suggestions that rehearing be held *en banc* were denied on October 11, 1985 (*id.* at 94a-99a). The petitions for certiorari were filed on December 4, 1985, and the writs were granted on January 13, 1986. This Court has jurisdiction under 28 U.S.C § 1254(1).

STATUTES AND TREATIES INVOLVED

The pertinent provisions of the International Convention for the Regulation of Whaling, the Pelly Amendment, and the Packwood-Magnuson Amendment appear in the Appendices, at 1a-8a. The Murazumi-Baldrige

[1] The Court has granted leave to dispense with the filing of a joint appendix and has ordered that the separately printed appendix to the petition in No. 85-955 and the joint appendix submitted to the court below shall suffice in lieu thereof. The appendix to the petition in No. 85-955 is hereinafter cited as "Pet. App." The appendix attached to this brief is cited as "App."

Agreement and ancillary documents appear in Pet. App. 102a-119a.

STATEMENT

This case concerns an order of the district court, affirmed by a divided panel of the court of appeals, that if allowed to stand would place the United States in breach of an agreement with Japan. In that agreement, Japan made irrevocable concessions, satisfactory to the responsible United States Executive Branch official, intended to avoid precisely the punitive sanction that the court's order would force the Executive Branch to impose. This extraordinary exercise of judicial power arises out of a controversy over commercial whaling operations.

The Convention And Whale Quotas

The International Convention for the Regulation of Whaling (ICRW) was signed in 1946 and entered into force for the United States in 1948. It established a system of international regulation the purposes and objectives of which are "to protect all species of whales from further overfishing" with the recognition that "whale stocks are susceptible of natural increases if whaling is properly regulated, and that increases in the size of whale stocks will permit increases in the numbers of whales that may be captured

without endangering these natural resources." The ICRW was to be administered "without causing widespread economic and nutritional distress . . . and thus make possible the orderly development of the whaling industry." International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.S.T. 72, T.I.A.S. No. 1949, Preamble (App. 1a-2a).

The International Whaling Commission (IWC), created by the ICRW, establishes and sets forth in its so-called "Schedule" such matters as annual whaling quotas, the whaling seasons, and regulations governing permissible whaling methods. All amendments to the Schedule including whaling quotas must, to be lawfully enacted, comply with Article V-2 of the ICRW. That Article requires, *inter alia*, (1) that the amendment be "necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources," (2) that the amendment "be based on scientific findings," and (3) that it "take into consideration the interests of the consumers of whale products and the whaling industry." (App. 2a.)

Under the terms of Article V-3 of the ICRW, any government that presents an objection to the IWC within 90 days of notification of the adoption of an amendment to the Schedule is exempt, and the amendment does not become effective as to the objecting

government. (App. 2a-3a.) The right to present an objection is absolute and unqualified.

In 1981, the IWC, in Footnote 1 to Table 3 of the Schedule, established a zero catch limit for the Western Division Stock of North Pacific Sperm Whales. The IWC adopted this amendment without satisfying the three requirements of Article V-2 of the ICRW. On November 1, 1981, Japan filed a timely objection to Footnote 1 of Table 3 pursuant to Article V-3 of the ICRW. Thereafter, the IWC reconsidered and agreed to allow a taking of 450 sperm whales in the 1982-83 coastal season and 400 sperm whales in the 1983-84 coastal season but did not establish a quota for the 1984-85 coastal season or for any period thereafter.[2] Japan thereupon announced its intent to take whales inasmuch as the filing of the timely objection enabled Japan to do so without being in violation of the ICRW.

In 1982, the IWC adopted an amendment that would impose a moratorium on all commercial whaling effective at the end of the 1985-86 coastal whaling season and the 1984-85 pelagic (high seas) whaling season. As in the case of the sperm whale quotas, the IWC adopted this amendment without satisfying the

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[2] The season for sperm whales, which are taken off coastal Japan, runs from August of each year through March of the following year.

three requirements of Article V-2 noted above.[3] Japan also filed a timely objection to this amendment pursuant to Article V-3 of the treaty.

The United States Statutes

Two United States statutes bear on this case. In 1971, Congress enacted the so-called Pelly Amendment to the Fishermen's Protective Act, which is Section 8(a) of that statute. 85 Stat. 768, 22 U.S.C. § 1978(a) (App. 4a-6a). Its operative provision reads:

> When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which

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[3] In particular, the IWC failed to base its moratorium decision on scientific findings. As explained by the official observer of the United Nations Food and Agriculture Organization at the International Whaling Commission, 34th Session: "The continuation of commercial whaling can also be threatened by management measures that are too restrictive. The most extreme example is a moratorium on all whaling. This is a completely unselective measure. Given the differing status of the various stocks, and the fact that virtually all those species or stocks that are seriously depleted are already receiving complete protection, there seems to be no scientific justification for a global moratorium. A justification for a complete cessation of whaling can be put forward on aesthetic or moral grounds, but these seem outside the terms of reference of the Commission."

> diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.

Id. § 1978(a)(1). The President, upon receipt of certification by the Secretary of Commerce, is authorized by Section 8(a)(3) (App. 4a-5a) to direct the Secretary of the Treasury to prohibit the importation of fish products from the offending country for a period that the President decides is appropriate and to the extent that such a prohibition is permitted by the General Agreement on Tariffs and Trade.

In 1979, Congress enacted the Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act, as Section 201(e)(2). 90 Stat. 337, 16 U.S.C. § 1821(e)(2) (App. 7a-8a). The Packwood-Magnuson Amendment deals specifically with whaling and with the ICRW. It provides for an automatic sanction, the reduction of at least 50 percent of a country's allocation of fish that it can harvest in the United States fishery conservation zone, if the Secretary of Commerce certifies that nationals of that country are whaling in a way that diminishes the effectiveness of the ICRW.

Certifications under either the Pelly Amendment or the Packwood-Magnuson Amendment have been rare, and sanctions have been imposed only once. In the usual case, the possibility of United States certification and

sanction has led to negotiations between the United States and a country whose nationals are suspected of activity that diminishes the effectiveness of the ICRW (or some other ocean resources conservation program), and to the conclusion of an agreement that, in the view of the United States, furthers conservation objectives, eliminating the need for sanctions. That is what happened here.

The Murazumi-Baldrige Agreement

Prior to the beginning of the 1984-85 coastal whaling season, Japan entered into discussions with American officials in an attempt to resolve differences and avoid confrontation between the two nations on whaling issues. These discussions resulted in an exchange of letters between Yasushi Murazumi, Chargé d'Affaires *ad interim* of Japan, and Malcolm Baldrige, United States Secretary of Commerce, in which it was agreed that, if Japan withdrew its objection to the IWC's zero quota for sperm whales, then the Japanese could take up to 400 sperm whales in each of the 1984-85 and 1985-86 coastal seasons without being deemed to have "diminished the effectiveness" of the ICRW.

Secretary Baldrige stated by letter to Mr. Murazumi his conclusion that the limited amount of whaling in which Japan would be permitted to engage would not in fact diminish

the effectiveness of the ICRW conservation program:

> After consulting with the United States Commissioner to the International Whaling Commission (IWC), I have concluded that commercial harvest of whales by Japanese nationals within the limits and under the circumstances set forth in the Summary of Discussions attached to your letter [*i.e.*, 400 sperm whales in each of the 1984-85 and 1985-86 seasons] would not diminish the effectiveness of the International Convention for the Regulation of Whaling, 1946, or its conservation program.

(Pet. App. 107a.) The Secretary explained the basis for this conclusion (*id.* at 107a-08a):

> The reports of the IWC's Scientific Committee, as well as the IWC's 1982 decision to permit quotas of 450 and 400 whales for the 1982 and 1983 coastal sperm whaling seasons, respectively, indicate that sperm whaling in accordance with paragraph 1 of the Summary of Discussions attached to your letter is not inconsistent with the IWC's essential conservation purposes.

On December 11, 1984, the Government of Japan, pursuant to its undertaking in the Murazumi-Baldrige Agreement, filed a withdrawal, effective April 1, 1988, of its objection to Footnote 1 to Table 3 of the IWC Schedule pertaining to sperm whales. This withdrawal, by the terms of the IWC, is irrevocable. (Pet. App. 4a.)

There is a second part of the Murazumi-Baldrige Agreement. It provides that, if Japan agrees to end all commercial whaling by April 1, 1988, by withdrawing its objection to the general IWC moratorium as of that date, then the Japanese may take no more than 200 sperm whales in each of the 1986-87 and 1987-88 coastal seasons and may take other species of whales subject to other limitations to be negotiated between the United States and Japan, without the imposition of Pelly or Packwood-Magnuson sanctions. (Pet. App. 106a.)

Japan has not withdrawn its objection to the general moratorium because of the district court's decision, which would order Secretary Baldrige to dishonor this Agreement. However, Japan has committed itself to withdraw the second objection if that order is overturned. (Pet. App. 116a-17a.) In that event, all commercial whaling by Japanese nationals will cease on April 1, 1988.

The Proceedings Below

This action was brought in November 1984 before agreement had been reached between the United States and Japan. The plaintiffs are twelve animal welfare and conservation organizations and a former United States deputy commissioner to the IWC. The defendants are Secretary of Commerce Baldrige and Secretary of State Shultz. These petitioners, the Japan Whaling Association and the Japan Fisheries Association, intervened as a matter of right on the side of the two United States Cabinet officers.

The district court, Judge Richey, heard the case on cross-motions for summary judgment after the Murazumi-Baldrige Agreement was concluded. Judge Richey granted the plaintiffs' motion. He held that the phrase "diminish the effectiveness" of the ICRW as used in the Pelly and Packwood-Magnuson Amendments means, in the context of this case, any taking of whales in excess of an ICRW quota. In Judge Richey's view, the statutes preclude the exercise of judgment by the Secretary of Commerce; he must certify whenever nationals of a country have exceeded an ICRW quota, whatever the circumstances. The district court's judgment therefore directed the Secretary of Commerce to make a certification, in violation of the agreement that the Secretary himself had concluded with the Government of Japan, that would result in the automatic imposition of the

Packwood-Magnuson sanction on Japan and its fishing industry.

The court of appeals stayed the district court's judgment and heard the appeal on an expedited basis. It affirmed, agreeing with "the District Court's ultimate conclusion that certification in this case is mandatory, though . . . for slightly different reasons." On the basis of statements made during the course of congressional consideration of the Pelly and Packwood-Magnuson Amendments, the court of appeals held that, "although in some situations the Secretary has discretion whether to certify, the Secretary is required by law to certify a foreign country whose nationals are harvesting whales in excess of ICRW quotas." (Pet. App. 3a.) Judge Wright's opinion to this effect was joined by the late Judge Tamm.

District Judge Oberdorfer, sitting by designation, dissented. He said that he could not agree that, "in the circumstances of this case, the Pelly Amendment . . . should be construed to impose upon the Secretary of Commerce a ministerial duty to certify Japan solely because it is not adhering to an international whaling quota which is not binding on it." (*Id.* at 45a.) He also expressed his doubt that the case, which resulted in "add[ing] the Judicial Branch's voice to this delicate process" of conducting foreign affairs (*id.* at 50a), was justiciable; he said further that, even granting justiciability, the equities

required that the court abstain from exercising its powers in this situation.

Petitions for rehearing with suggestions for rehearing *en banc* were filed. Four of the seven active circuit judges who considered the *en banc* suggestions stated their "substantial agreement with the views expressed in Judge Oberdorfer's dissent" and would have granted the requested *en banc* rehearing. (Pet. App. 95a, 99a.) Two active circuit judges did not participate. Rehearing *en banc* therefore was denied for want of the majority of all the circuit judges in regular active service, including non-participants, that the court below requires in applying Fed. R. App. P. 35(a).

Interim Whaling By Japan

Members of the petitioner Japan Whaling Association, operating under licenses granted by their government, took the number of sperm whales allowed by the Murazumi-Baldrige Agreement in the 1984-85 coastal season. They are whaling again during the current 1985-86 season, which will end in April. Again, as in the first season, there have been no violations or even allegations that Japanese whalers have exceeded the permissible take of 400 sperm whales. If the judgment below is reversed, Japan Whaling Association members will take only 200 sperm whales in each of the following two coastal seasons, and all commercial

Japanese whaling will cease at the end of the second such season, on April 1, 1988.

SUMMARY OF ARGUMENT

I

The language of the Pelly and Packwood-Magnuson Amendments, calling for a determination by the Secretary of Commerce whether certain conduct by foreign fishermen or whalers diminishes the effectiveness of an international fisheries conservation program, is plainly discretionary language, requiring the Secretary to exercise his informed judgment. Had Congress wished to impose upon him the duty of certifying any taking of fish or whales in excess of an international quota, it would have used quite different language.

The judgmental purport of the language is confirmed by the legislative history of the two statutes, a point that will be fully developed in the brief for the federal petitioners. Among the key items of the legislative history are (1) the understanding manifested in 1978, when the Packwood-Magnuson Amendment was enacted, by two key participants in the legislative process -- the chairman of the pertinent House subcommittee and the President -- that, under the existing Pelly Amendment and the new provision, certification was not mandatory for any and all violations of quotas but was

discretionary; and (2) the same understanding manifested in 1984 by the surviving author of the Packwood-Magnuson Amendment when he proposed a further amendment that would clearly have made certification and sanctions obligatory when a quota was exceeded.

Even if there were a serious question whether Congress intended to delegate authority to the Secretary of Commerce to exercise judgment with respect to certification under the Pelly and Packwood-Magnuson Amendments, he himself has so construed his authority. That construction by the responsible administrator of the statute is reasonable, and it must therefore be respected by a reviewing court. *Chevron, U.S.A.* v. *Natural Resources Defense Council*, 104 S. Ct. 2778 (1984).

To read the two statutes as requiring the Secretary of Commerce to certify a foreign nation in every case in which an international fisheries quota is exceeded is to raise unnecessarily a serious constitutional question -- the question whether sovereign power of the United States has been unlawfully delegated to an international body, the International Whaling Commission. The improper delegation objection is avoided only if the statutes are read as providing for the intervention of an exercise of judgment on the part of a United States official before sanctions are imposed to enforce such a body's decision.

II

A long-standing rule of statutory construction, reiterated and applied by this Court two years ago in *Trans World Airlines* v. *Franklin Mint Corp.*, 104 S. Ct. 1776, 1783 (1984), requires that Congress express itself clearly and unambiguously if it is to be deemed to have abrogated or modified an existing treaty. In this case the relevant treaty, the ICRW, expressly provides in Article V-3 that a nation may exempt itself from a quota established by the IWC. If the United States imposes sanctions on such a nation for exceeding a quota that by the terms of the Convention is not applicable to it, the result is the unilateral modification or abrogation by the United States of a right under a treaty to which it subscribes. The language of the Pelly and Packwood-Magnuson Amendments does not express clearly and unambiguously an intent to reach a nation that, by filing an objection, has made a whaling (or other) quota inapplicable to it. The history of the Amendments does not reflect any intent on the part of Congress to abrogate or modify the ICRW or other fishery treaties.

Application of the Pelly and Packwood-Magnuson Amendments to a nation that has filed an objection and thus exempted itself from an international fishery quota would place the United States in violation of international law. The Convention does not, explicitly or implicitly,

allow such an application of sanctions, and the coercion of a treaty signatory to forgo a treaty right is condemned by principles of international law. Moreover, it runs counter to the policy of the United States, which is to insist upon escape valves such as Article V-3 of the ICRW.

III

The case is not justiciable. It is not within the judicial power of a United States court to command an Executive Branch official to dishonor an international agreement, as the United States would be here required to dishonor the Murazumi-Baldrige Agreement. Under the test of justiciability stated in *Baker* v. *Carr*, 369 U.S. 196, 217 (1962), the courts below should have considered the consequences of judicial action, including "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." The nation is embarrassed by having to dishonor its word, by having to do so at the expense of foreign nationals who have acted in reliance on its word, and by so behaving that its word is regarded skeptically by all other nations.

Even if the case is justiciable, traditional equitable considerations demanded that the courts below stay their hands. An injunction is an equitable remedy that should be withheld

where the equities so warrant. The same thing is true if the order below is regarded as in the nature of mandamus. Here the equities weigh strongly in favor of the Secretary of Commerce and these intervening Japanese petitioners, on whom the judicially mandated sanctions would fall. The overriding equitable consideration is that the order of the courts below would have the United States repudiate an agreement on which these petitioners have relied and impose a sanction in retribution for the very conduct in which they engaged in good faith on the strength of the word of the United States.

ARGUMENT

The federal defendants will develop the arguments that:

(1) on its face, the language of the Pelly and Packwood-Magnuson Amendments -- "diminish the effectiveness" -- calls for the exercise of judgment by the Secretary of Commerce in making his decision whether activities of foreign nationals in fact diminish the effectiveness of an international fishery conservation program, and particularly the International Convention for the Regulation of Whaling;

(2) the legislative history does not compel (or even seriously suggest) a reading of the statutes that departs from their plainly judgmental terms and instead imposes on a Cabinet officer acting in the delicate, shifting arena of international relations a ministerial duty to punish another nation; and

(3) in any event, the Secretary's reading of the statutes as calling for the exercise of his judgment is a reasonable, if not required, reading, and is therefore entitled to judicial deference -- greater deference than usual for the very reason that the statutes deal here with foreign relations.

Petitioners Japan Whaling Association and Japan Fisheries Association endorse those arguments fully. In Part I, petitioners state summarily the argument that will be fully developed in the government's companion brief, emphasizing certain aspects of the legislative history, and intending not to duplicate the government's brief. Also in Part I, these petitioners urge that a serious constitutional question of unlawful delegation is raised if the statutes are read as making the Secretary of Commerce a mere instrument for enforcing decisions of the International Whaling Commission.

Japan Whaling Association and Japan Fisheries Association, representatives of the Japanese citizens whose good faith whaling brought on the judicially mandated sanctions that the Court is considering and who would be immediately affected by the imposition of those sanctions, argue in this brief -- with the approbation of their government -- that the statutes do not require the imposition of the sanctions for a more fundamental reason: Under the ICRW itself and therefore at international law, Japan, having filed objections to the IWC quotas in question, is exempt from those quotas and legally free to ignore them.

Domestic United States statutes should not and indeed cannot, consonantly with international law, be construed as providing for the mandatory imposition of sanctions against a nation that has done no wrong in the eyes of its treaty partners (which include the United States) or in the eyes of the international community more generally. That argument is developed in Part II hereunder.

In Part III, these petitioners urge that the subject matter of the suit is such that it should not have been entertained and that, in any event, no United States court can or properly should enter the order that has been entered in this case. Limitations on judicial power and considerations of equity counsel against any judicial order compelling a high official to act in

breach of an international agreement that he has concluded with a friendly nation, on which that nation and its citizens have relied in good faith, and to impose upon the friendly nation for that very reliance the precise penalty that both parties intended the agreement to avoid.

I. THE PELLY AND PACKWOOD-MAGNUSON AMENDMENTS DO NOT REQUIRE THE SECRETARY OF COMMERCE TO CERTIFY AUTOMATICALLY ANY NATION WHOSE CITIZENS TAKE WHALES IN EXCESS OF AN IWC QUOTA.

The Secretary of Commerce concluded on the basis of his study of the scientific data, prior actions of the IWC, consultation with the United States Commissioner to the IWC, and the Japanese undertaking in the Murazumi-Baldrige Agreement that the taking by Japan of the limited number of whales allowed by the Agreement before Japanese commercial whaling was phased out would not diminish the effectiveness of the ICRW. That is plainly an allowable judgment under the terms of the governing statutes.

A. The Plain Meaning Of The Statutory Language Grants Discretion To The Secretary Whether To Certify.

On their face, the Pelly and Packwood-Magnuson Amendments authorize the

Secretary of Commerce to exercise discretion in determining whether to certify a nation for its whaling activities. The critical language in the Pelly Amendment, mirrored in the Packwood-Magnuson Amendment, directs the Secretary to certify a nation when he "determines that [its nationals], directly or indirectly, are conducting fishing operations . . . which diminish the effectiveness" of an international fishing conservation program. (App. 4a. *Cf. id.* at 7a.) Congress did not command the Secretary to certify any nation whose nationals take whales in excess of an IWC quota. Had that been its intent, it would have used language very different from language directing the Secretary to make the plainly judgmental determination whether conduct diminishes the effectiveness of a conservation agreement.

Such a determination requires an analysis of the fishing or whaling operations and the international conservation program in question; it also demands the application of the expertise of the Secretary and his subordinates, who are uniquely qualified to analyze the effect of such operations on the international program. A determination whether conduct diminishes the effectiveness of a multilateral treaty is no mere ministerial act. It calls, instead, for careful evaluation and ultimate resolution by a high-ranking Cabinet official of matters of great importance to United States conservation and foreign policy. In short, the plain meaning of

the statutes is to authorize the Secretary to exercise discretion.

B. The Legislative History Confirms That The Secretary Has Discretion Under The Statutes.

The legislative history of both the Pelly and Packwood-Magnuson Amendments confirms that the Secretary is meant to exercise his judgment in determining whether a nation has acted so as to diminish the effectiveness of the ICRW. Petitioners leave to the Solicitor General a full analysis of the legislative history and the lower courts' misapprehension of it. Petitioners invite the Court's attention to two points that merit particular attention.

First, statements made at the time of enactment of the Packwood-Magnuson Amendment in 1979, by a responsible legislator and by the final actor in the legislative process, the President, demonstrate that, under both Packwood-Magnuson and the earlier Pelly Amendment, the Secretary's determination whether a nation's actions diminish the effectiveness of the ICRW was understood to be a discretionary determination.

The effect of the Packwood-Magnuson Amendment was to make the imposition of sanctions mandatory when a nation is certified

for diminishing the effectiveness of the ICRW. Under the Pelly Amendment, the imposition of sanctions had been discretionary (and continues to be for other conservation programs).

Congressman Breaux, chairman of the Subcommittee on Fisheries and Wildlife Conservation and the Environment, of the House Merchant Marine and Fisheries Committee, carefully explained the change and made clear in doing so that under both Amendments the Secretary's original decision whether to certify was discretionary. He stated his understanding that "under the Pelly amendment, as it exists, there are really two areas in which there are optional actions that can be taken by the administration." *Hearings Before the Subcommittee on Fisheries and Wildlife and the Environment of the House Committee on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 314-15 (1979) [hereinafter cited as *Hearings*]. These, he continued, were:

> First, in certifying that a country is in violation of some international agreement, and there is a lot of flexibility in that certification [,] and, second, after a nation is certified there is still discretion in determining whether a ban on imports of that country's products will in fact be imposed against that country. Therefore, under Pelly we

> have two discretionary features, whereas in the Packwood amendment, you are really taking all of the discretionary features and putting them in the first category which is the certification of a nation being in violation of an international agreement.

The court of appeals dismissed what Congressman Breaux said, characterizing it as "ambiguous." (Pet. App. 36a n.20.) In reality, this statement is not in the least ambiguous. Congressman Breaux clearly stated, *Hearings*, *supra*, at 317, that "[t]he Secretary has the discretion in making a certification decision."

President Carter reiterated Congressman Breaux's point when he signed the Packwood-Magnuson Amendment into law. He said:

> With regard to both the Packwood-Magnuson and Pelly Amendments the Secretaries of Commerce and the Interior should work with the Secretary of State to take prompt action to ensure that all avenues of negotiation are fully exhausted before certification is made against any foreign nation.[4]

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[4] Presidential Signing Statement, 15 Weekly Comp. Pres. Doc. 35 (Aug. 15, 1979).

Second, Senator Packwood, one of the sponsors of the Packwood-Magnuson Amendment, made clear his understanding of the Secretary's discretionary role when he introduced in 1984 a further amendment to the Magnuson Fishery Conservation and Management Act. His amendment would have eliminated any occasion for a judgmental determination by the Secretary of Commerce. His proposal was to "deem to be certified" for the purposes of the Packwood-Magnuson Amendment "[a]ny nation whose nationals conduct commercial whaling operations [after 1986] unless such whaling has been authorized by the International Whaling Commission." (App. 9a.) Had Senator Packwood believed that the 1979 amendment he authored already required certification of a country whose nationals were exceeding IWC quotas, he would not have proposed that further amendment. His amendment was defeated in a House-Senate Conference Committee. *See* Letter from Congressman Dante B. Fascell, Chairman of House Committee on Foreign Affairs, to Congressman Mervyn M. Dymally (Sept. 6, 1984) (App. 11a).

C. Deference Is Owing To The Secretary's Reasonable Construction Of The Statutes He Administers.

Apart from all else, the Secretary of Commerce in this case, and on prior occasions, has consistently construed the Pelly and Packwood-Magnuson Amendments as calling for a judgment on his part whether particular fishing or whaling activity diminishes the effectiveness of the ICRW or some other international fishing convention. His interpretation of the statutes is clearly correct, based on their language and their history, and is at the very least reasonable. It therefore commands the deference of a reviewing court under familiar principles that this Court has emphasized again and again in the last several terms. *See, e.g., Chevron, U.S.A.* v. *Natural Resources Defense Council*, 104 S.Ct. 2778, 2782 & n.9 (1984). *See also Chemical Manufacturers Association* v. *Natural Resources Defense Council*, 105 S. Ct. 1102, 1112 (1985); *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981); *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 75 (1975).

D. An Interpretation Of The Statutes As Imposing On The Secretary A Ministerial Duty To Certify Any Taking In Excess Of IWC Quotas Unnecessarily Raises A Serious Constitutional Question Concerning Unlawful Delegation Of Power.

The court below interpreted the Pelly and Packwood-Magnuson provisions as manifesting a congressional intent "to provide enforcement leverage" to the IWC. The court's opinion candidly admits that, under the terms of this IWC enforcement machinery, "[d]iscretion is vested in the international body rather than in the member nations," *i.e.*, discretion is vested in the IWC rather than in the Executive Branch of the United States Government. (Pet. App. 40a.) According to this interpretation, whenever the IWC exercises its discretion and, for example, adopts a zero quota or a moratorium, the Secretary of Commerce lacks any discretion and must certify a nation once he finds that nationals of that country have taken a single whale. Upon such certification the Secretary of State must automatically impose the Packwood-Magnuson sanction.

This interpretation of the Pelly and Packwood-Magnuson Amendments raises a serious question whether Congress has

authority under the Constitution to fashion a system in which the Secretaries of Commerce and State become the enforcement arm of the IWC.

Congress has never attempted forthrightly to delegate Executive Branch power to an international organization. Consequently, there are no judicial decisions that have directly ruled on the question whether Congress has power to subject the Executive Branch to the will of an entity such as the IWC to enforce its legislation. This Court long ago indicated, however, in *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889), that Congress has no such power:

> [The powers of government] cannot be granted away or restrained on behalf of anyone. [They] are delegated in trust to the United States, and are incapable of transfer to other parties. They cannot be abandoned or surrendered.

From the delegation cases of the 1930s we know that there are limits on the power of Congress to delegate legislative powers to executive agencies, state agencies, and private industrial groups. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936).

And we know that the doctrine of those cases is alive, cautioning against any open-ended construction of statutes conferring powers on executive agencies. Three Justices recently joined in a prevailing opinion that warned against statutory interpretations that "would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under the Court's reasoning in [*Schechter* and *Panama Refining*]. A construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607, 646 (1980) (opinion of Stevens, J.). A concurring Justice thought the statute unconstitutional as a standardless delegation of power. *Id.* at 671-88 (concurring opinion of Rehnquist, J.).

The construction of Pelly and Packwood-Magnuson that results in the conferral of all discretionary authority upon the IWC, leaving United States officials as mere enforcers of decisions reached by another body, presents an *a fortiori* case of unconstitutional delegation.

One of the fundamental objections to overbroad delegation is that it vests power in the hands of persons or entities that are not accountable, as Congress is, to the electorate of the United States. In the decided cases, the delegate was at least a domestic United States entity, *i.e.*, an organization approved by the

President or a state or federal agency. In the instant case, the delegate would be the IWC, an international organization that is in no way accountable to the American electorate.

Second, in *Panama Refining* and *Schechter*, the President retained discretion to approve or modify the acts of the delegate. In the instant case the authority that would be delegated to the IWC is the Executive Branch power to exercise discretion to determine when it is lawful to issue certification and thereby impose the Packwood-Magnuson sanction. The Executive Branch would be deprived of all discretion. The discretion would be vested in the IWC.

Finally, another fundamental policy objection to overbroad delegation is the potential for abuse of the lawmaking and enforcement process. In the instant case the amendments establishing the moratorium and zero quota were enacted without compliance with Article V-2 of the ICRW, which establishes prerequisites to the adoption of quotas by the IWC, yet the court below would have the Executive Branch enforce these amendments as a ministerial duty.

This Court has repeatedly held that courts must adopt statutory interpretations which "avoid constitutional problems." *National Cable Television Association* v. *United States*, 415 U.S. 336, 342 (1974). As Justice

Brandeis stated in his famous concurring opinion in *Ashwander* v. *TVA*, 297 U.S. 288, 348 (1936):

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.

Here the constitutional construction of the Pelly and Packwood-Magnuson Amendments is not just "fairly possible." It is commanded by text, history, and principles of deference. The constitutional doubt -- a serious doubt -- therefore is easily avoided.

II. THE STATUTES SHOULD NOT BE READ AS REQUIRING THE IMPOSITION OF SANCTIONS AGAINST A NATION THAT HAS EXEMPTED ITSELF FROM THE INTERNATIONAL REQUIREMENT THAT THE SANCTIONS ARE INTENDED TO ENFORCE.

A. An Interpretation Of The Statutes As Applying To A Party That Has Exempted Itself From An IWC Quota Improperly And Unnecessarily Creates A Conflict Between The Statutes And The ICRW.

This Court has held repeatedly that federal domestic legislation enacted subsequent to the conclusion of a treaty to which the United States is a party must be construed in a fashion consistent with the treaty provisions unless Congress *expressly* repeals or modifies the treaty provision. The most recent statement of this rule came two years ago:

> There is . . . a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action. "A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."

Trans World Airlines v. *Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (citation omitted). A century earlier, the Court had said much the same thing: "[T]he court ought, if possible, to adopt that construction which recognized and saved rights secured by the Treaty." *Chew Heong* v. *United States*, 112

U.S. 536, 549 (1884). *See also Pigeon River Improvement, Slide & Boom Co.* v. *Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934) ("the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress").

Section 134 of the most recent version of the Restatement of Foreign Relations Law (Tentative Draft No. 6, 1985), codifies these decisions: "A United States statute is to be construed so as not to bring it into conflict with international law or with an international agreement of the United States."

Article V-3 of the ICRW allows a signatory nation to object to an IWC quota and render that quota inapplicable to it. A nation that has properly objected is free under the Convention and under generally recognized principles of international law to ignore the IWC quota to which it has objected. As a party to the ICRW, the United States is bound by Article V-3 as much as by any other provision of the Convention. Indeed, the United States has been at the forefront of the nations that have insisted upon escape valves such as Article V-3 as a condition of signing multilateral conventions (*see* Part II.C., *infra*).

If the Pelly and Packwood-Magnuson Amendments are construed as applicable to a nation that has filed Article V-3 objections -- as calling for the imposition of sanctions on such a nation because it has exceeded a quota from

which it is exempt -- then those statutes are inconsistent with Article V-3 and indeed abrogate the treaty right that is stated in Article V-3. In the absence of much more explicit language, the Pelly and Packwood-Magnuson Amendments cannot be so construed.

Indeed, Congress clearly intended the Amendments to authorize certification only when a nation has violated the ICRW by failing to enforce lawfully binding quotas upon their nationals. Literally every Congressman who addressed the subject clearly indicated that only violations, flagrant violations, or flouting of the Convention could be regarded as conduct that diminishes the effectiveness of the Convention.[5] A nation that has exempted itself under Article V-3 is not lawfully bound by the relevant quota, is not in violation of the ICRW, and cannot be certified under the Amendments.

Petitioners make this argument with full knowledge that the Pelly Amendment was born of the need felt by Congress to do something about salmon fishing by Danish nationals at a time when Denmark had objected to a salmon

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[5] For example, Congressman Pelly's own definition of conduct that "diminishes the effectiveness" of the treaty was a "case of *flagrant violations* of any international fishery conservation program to which the United States has committed itself." 117 Cong. Rec. 34752 (1971) (emphasis added). *See also* 125 Cong. Rec. 21743 (1979) (statement of Sen. Packwood); *id.* (statement of Sen. Magnuson); *id.* at 22082-83 (statement of Cong. Murphy).

quota under a provision comparable to Article V-3. Congress, to be sure, acted with the Danish fishermen in mind. But it acted without a hint anywhere in the legislative history of the Pelly Amendment (or of the Packwood-Magnuson Amendment for that matter) that it meant to act inconsistently with United States treaty undertakings. The want of any expressed intent so to act -- the want of any expressed intent to abrogate Article V-3 and comparable provisions of other fisheries conventions -- requires that, despite their genesis, the statutes be read as not applying to a nation that has exercised its Article V-3 rights.

B. The Imposition Of Sanctions Against Japan Would Result In Violation Of International Law.

It is not only the rule of construction that has come down from *Chew Heong* and was so lately restated in the *Trans World Airlines* case that condemns any application of the Pelly and Packwood-Magnuson Amendments to a nation that has exempted itself from an ICRW quota. Any such application also results in violation of international law.

The court below believed that the use of Pelly and Packwood-Magnuson sanctions as "enforcement leverage," to coerce signatory nations not to exercise their unqualified right to object and become exempt from unacceptable

IWC action, does not violate international law. The court did not support this conclusion with either analysis or judicial authority. It merely stated that "[t]here is no prohibition in the Convention against member nations acting unilaterally to force an objecting member . . . to comply with the Convention's regulations, even when those regulations are not binding on the member . . . under the terms of the Convention itself." (Pet. App. 5a n.1.) The Solicitor General makes the same argument.

The "coercion" thesis advanced by both the court below and the Solicitor General is inherently fallacious. It would vitiate the concept of treaty-making if signatories were free to coerce fellow signatories to abstain from the exercise of unqualified treaty rights by the threat of sanctions authorized by domestic legislation unless the treaty itself forbade the use of such coercion. This Court has consistently held that treaties must be interpreted in a spirit of *uberrima fides, i.e.*, with the most scrupulous good faith. *Tucker* v. *Alexandroff*, 183 U.S. 424, 437 (1902). *Accord Jordan* v. *Tashiro*, 278 U.S. 123, 127 (1928). It is not the most scrupulous good faith to insist that what is not specifically forbidden by a treaty is allowed when the effect of so insisting is to prevent the exercise of a treaty right.

As a signatory to the ICRW, the United States is bound as a matter of international law to honor all of the provisions of that Convention.

In fact, the United States was the author and principal proponent of Article V-3 and has never subsequently lodged any reservation with respect to its applicability to all members of the ICRW. Consequently, Article 26 of the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, *entered into force* Jan. 27, 1980, U.N. Doc. A/Conf. 39/27, *reprinted in* 63 Am. J. Int'l L. 875 (1969), is relevant:

> Every Treaty in force is binding upon the parties to it and must be performed by them in good faith.

The United States has signed and recognized but not ratified the Vienna Convention, which is "the authoritative guide to current treaty law and practice." S. Exec. Doc. L., 92nd Cong., 1st Sess. 1 (1971). The Restatement of Foreign Relations Law accepts the Vienna Convention as presumptively codifying the customary international law governing international agreements, and therefore as foreign relations law of the United States. Restatement of Foreign Relations Law § 131 (Draft No. 6, 1985).

In addition, the Restatement further provides: "Courts in the United States are bound to give effect to international law and international agreements of the United States." *Id.* § 131(3). This principle clearly precludes the use of coercion to prevent exercise of one of the key rights of the ICRW.

Moreover, the use of an economic sanction to coerce Japan to relinquish its rights under Article V-3 of the ICRW also constitutes an abuse of right under international law. The use of the otherwise legitimate rights of the United States to control fishing in its fishery conservation zone and to regulate fish imports for the *express purpose* of avoiding its treaty obligation to honor Japan's right to object under Article V-3 is an abusive exercise of those rights.

> The principle of good faith which governs international relations controls also the exercise of rights by States. The theory of abuse of rights (*abus de droit*), recognized in principle both by the Permanent Court of International Justice and the International Court of Justice, is merely an application of this principle to the exercise of rights. [6]

The concept of abuse of right includes evasion of treaty obligations (to respect the rights of fellow signatories) and is prohibited by and violates international law. Bin Cheng, *General Principles of Law as Applied by International Courts & Tribunals* 123 (1953). It is difficult to conceive of a more

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6 *Fisheries Case* (U.K. v. Norway), 1951 I.C.J. 116, 142.

patent abuse of right than the use of economic force or the threat thereof to coerce a nation to relinquish a treaty right that the United States is obligated to recognize and honor in good faith.

C. Coercion Of Signatories To Abstain From Exercising Article V-3 Rights Conflicts With Established United States Foreign Policy.

The United States was the author and principal proponent of Article V-3. The retention of the power to object and become exempt from action taken by an international body pursuant to an international convention is an established principle of United States foreign policy. United States adherence to this principle as embodied in Article V-3 of the ICRW was rearticulated by the special ambassador to the Third International Conference on the Law of the Sea:

> The treaty provides for a review conference which, after five years of negotiations, may adopt amendments to the deep seabed mining regime that could automaticaily enter into force for the United States upon approval by three-fourths of the states parties and thus effectively bypass U.S. approval, including congressional advice and consent. Our only

> recourse would be denunciation of the convention -- an unacceptable choice.[7]

Under the interpretation of Pelly and Packwood-Magnuson by the Solicitor General and the court below, the United States would take the position before the world community that it will insist upon having and exercising an objection mechanism in all multilateral treaties in which it participates, but it will use economic sanctions to prevent other signatories from exercising the right that it demands. Such an interpretation is clearly wrong and should be avoided. There is no indication that Congress intended such a result when it enacted the Pelly and Packwood-Magnuson Amendments. As Judge Oberdorfer concluded in his dissent below (Pet. App. 45a):

> I cannot agree that, in the circumstances of this case, the Pelly Amendment . . . should be construed to impose upon the Secretary of Commerce a ministerial duty to certify Japan solely because it is not

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[7] Bureau of Public Affairs, U.S. Dep't of State, Current Policy No. 4156, at 3 (statement of Special Ambassador Malone, Aug. 12, 1982). *See also id.* at 1-2 (statement of President Reagan) ("These decisions reflect the deep conviction that the United States cannot support a deep seabed mining regime . . . [that] would allow amendments to enter into force for the United States without its approval; this is clearly incompatible with the U.S. approach to such treaties.").

adhering to an international whaling quota which is not binding on it.

III. COMMANDING THE EXECUTIVE TO DISHONOR AN INTERNATIONAL AGREEMENT SUCH AS THE MURAZUMI-BALDRIGE AGREEMENT EXCEEDS PRUDENTIAL AND EQUITABLE LIMITATIONS ON JUDICIAL AUTHORITY.

A. Giving A Command To An Official Of The United States To Dishonor An International Agreement Is Beyond The Authority Of United States Courts.

The majority below failed to consider the question whether this case presents a justiciable question. As Judge Oberdorfer noted, "the justiciability issue is important and should ordinarily be decided before reaching the merits." (Pet. App. 49a.) "The hazards of such judicial involvement in issues ordinarily reserved for the political departments of our government could make this controversy unsuitable for judicial action." (*Id.* at 50a.)

The Supreme Court ruled in *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918):

> The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and

> Legislative -- "the political" -- Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.

The Court has subsequently reaffirmed that "[t]he President alone has the power to speak or listen as a representative of the nation," *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), and that "the President is exclusively responsible" for the "conduct of diplomatic and foreign affairs," *Johnson* v. *Eisentrager*, 339 U.S. 763, 789 (1950). "Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of governments as to be largely immune from judicial inquiry or interference.' " *Regan* v. *Wald*, 82 L. Ed. 2d 171, 186 (1984) (citation omitted).

One of the tests of whether a case is nonjusticiable is "the possible consequences of judicial action." *Baker* v. *Carr*, 369 U.S. 186, 211-12 (1962). If one of the "possible consequences of judicial action" is "embarrassment from multifarious pronouncements by various departments on one question," judicial action is barred. *Id.* at 217.

In this case the most severe embarrassment results from the action of the courts below:

(1) The Executive Branch is directed to dishonor the Murazumi-Baldrige Agreement, thereby resulting in a violation by the United States of international law and the disruption of relations between the United States and Japan.

(2) Foreign nations other than Japan are bound to look skeptically at the pledged words of the United States if judges are empowered to hold them for naught.

(3) The United States is placed in the untenable position of imposing massive sanctions on a country and its nationals for their very reliance on the word of the United States.

Clearly, these possible untoward consequences make this case, as Judge Oberdorfer suggested, "unsuitable for judicial action." (Pet. App. 50a.)

B. A Judicial Command To Dishonor An International Agreement And To Impose Severe Sanctions On Nationals Of A Friendly Nation For Conduct Authorized By The Agreement Is An Abuse Of The Court's Equity Powers.

Judge Oberdorfer concluded that "it was not necessary . . . to determine whether the case is justiciable" (Pet. App. 50a-51a), in part because it was clear to him that equitable considerations counseled so strongly against the mandatory order entered by the district court. The same prudential considerations that call justiciability into question also call into question whether it was proper for the district court to exercise its equity powers at all in this case. These prudential considerations call for reversal of the district court's order, especially when evaluated in conjunction with traditional equity concerns, which militate strongly against the particular equitable choices made by the courts below.

The order violates the long established maxim that equity must do equity and the Supreme Court's holding that "the essence of equity jurisdiction has been the power of the Chancellor to do equity." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944). This is a case in which equities had to be weighed before relief was granted, for "an injunction is an equitable

remedy. It 'is not a remedy which issues as of course.'" *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 311 (1982) (quoting *Harrisonville* v. *W.S. Dickey Clay Manufacturing Co.*, 289 U.S. 334, 337-38 (1933)). The issuance of an injunction is in the sound discretion of the court. "[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." 456 U.S. at 313. And "[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* at 312. The necessity to weigh the equities is not different if the case is regarded as one of mandamus. "[M]andamus is itself governed by equitable considerations and is to be granted only in the exercise of sound discretion." *Whitehouse* v. *Illinois Central Railroad*, 349 U.S. 366, 373 (1955).

Here the equitable considerations arguing against an injunction or mandamus are extraordinarily strong and, as Judge Oberdorfer said, "weigh heavily in favor of the Secretary." The Government of the United States, through the Secretary of Commerce, has given its word in the reasonable understanding of the Pelly and Packwood-Magnuson Amendments that it has the authority to do so. The Government of Japan has made a reciprocal promise and acted on that promise to its detriment in reasonable reliance on the word of the United States.

Equity does not empower the district court to have entered the order it did, breaking the word of the United States and inflicting severe hardship on Japan and its nationals.

The Government of Japan was entitled to rely on the United States Government adhering to the Murazumi-Baldrige Agreement. Concerned over the threat of certification in 1984, Japan followed the ordinary and usual course available to foreign countries. It negotiated with the Executive Branch authorities responsible for implementing the statutes in question, relinquished its international treaty right to exempt itself from unacceptable IWC decisions, and agreed to limit and eventually discontinue its nationals' legitimate whaling activity. Japan made these major concessions with the assurance from the responsible United States authorities that, if Japan carried out its duties and obligations under the negotiated Agreement, the United States would fulfill its promise not to certify or sanction Japan for activities authorized by that Agreement.

Japan has performed its part of the bargain. It unconditionally withdrew its objection to the sperm whale quota, effective April 1, 1988, and it is committed to withdraw its objection to the moratorium upon the favorable outcome of this case. (Pet. App. 116a-17a.) It has taken these actions despite its conviction that the quotas to which those

objections would apply were not adopted in accordance with the requirements of the ICRW.

In addition, the Government of Japan has issued licenses to members of petitioner Japan Whaling Association as permitted by the Agreement, and it has ensured that those members have scrupulously adhered to the Agreement's limits. Japanese whalers have reduced their take of sperm whales from over 5000 whales in the 1977-78 coastal season to 400 whales in the 1984-85 season and the current 1985-86 season. They have promised to take no more than 200 whales in each of the 1986-87 and 1987-88 seasons, and to take *no* whales after April 1, 1988 -- promises that will be kept as faithfully as the promises for the current and preceding seasons have been kept. In view of such good faith performance of and reliance on the Murazumi-Baldrige Agreement, it cannot be said that the order of the district court is a sound exercise of equitable discretion. Rather, "such a major departure from that long tradition [equity must do equity] as is here proposed" should not be allowed to stand. *Hecht Co.* v. *Bowles*, 321 U.S. at 330.

Equitable powers may not be used to inflict a penalty, particularly when those who would be punished have not personally done wrong. *Hartford Empire Co.* v. *United States*, 323 U.S. 386, 434-35 (1945). "Mandamus is not a punitive remedy." *Will* v. *U.S.*, 389 U.S. 90, 107 (1967). Although the

order in this case does not penalize the Secretaries of Commerce and State, it does inflict an undue penalty on Japan and particularly on members of petitioner Japan Fisheries Association. These innocent third parties depend on fishing in United States waters and on sales of fish for import to the United States, privileges that the district court's order would deny them. They could not possibly have taken any action to avoid such punishment. It would be difficult to postulate a more extreme perversion of the traditional principle that equity must do equity. *See Hecht Co.* v. *Bowles*, 321 U.S. at 329.

As Judge Oberdorfer concluded, the ultimate equity here is that the United States and Japan made reciprocal promises based on a reasonable interpretation of the Pelly and Packwood-Magnuson Amendments, and based on a host of scientific, diplomatic, economic, and prudential considerations that are beyond the competence of the judiciary to evaluate. Even if these considerations do not require the courts to stay their hands, the equities that "weigh heavily in favor of the Secretary" and Japan precluded such a use of equitable powers as the district court employed. In the interests of "elementary fairness," *Moser* v. *United States*, 341 U.S. 41, 47 (1950), the United States should not be allowed, much less compelled by the judiciary, to dishonor its word.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING

[PREAMBLE]

The Governments whose duly authorized representatives have subscribed hereto,

Recognizing the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks;

* * *

Recognizing that the whale stocks are susceptible of natural increases if whaling is properly regulated, and that increases in the size of whale stocks will permit increases in the numbers of whales which may be captured without endangering these natural resources;

Recognizing that it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress;

* * *

Desiring to establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks on the basis of the principles embodied in the provisions of the

International Agreement for the Regulation of Whaling signed in London on June 8, 1937 and the protocols to that Agreement signed in London on June 24, 1938 and November 26, 1945; and

Having decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry;

Have agreed as follows:

* * *

ARTICLE V

* * *

2. These amendments of the Schedule (a) shall be such as are necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources; (b) shall be based on scientific findings; . . . and (d) shall take into consideration the interests of the consumers of whale products and the whaling industry.

3. Each of such amendments shall become effective with respect to the Contracting Governments ninety days following notification of the amendment by the Commission to each of the Contracting Governments, except that (a) if

any Government presents to the Commission objection to any amendment prior to the expiration of the ninety-day period, the amendment shall not become effective with respect to any of the Governments for an additional ninety days; (b) thereupon, any other Contracting Government may present objection to the amendment at any time prior to the expiration of the additional ninety-day period, or before the expiration of thirty days from the date of receipt of the last objection received during such additional ninety-day period, whichever date shall be later; and (c) thereafter, the amendment shall become effective with respect to all Contracting Governments which have not presented objection but shall not become effective with respect to any Government which has so objected until such date as the objection is withdrawn. The Commission shall notify each Contracting Government immediately upon receipt of each objection and withdrawal and each Contracting Government shall acknowledge receipt of all notifications of amendments, objections, and withdrawals.

APPENDIX B

PELLY AMENDMENT
22 U.S.C. § 1978(a)

Restriction on importation of fishery or wildlife products from countries which violate international fishery or endangered or threatened species programs

Certification To President

(a) (1) When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.

(2) When the Secretary of Commerce or the Secretary of the Interior finds that nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species, the Secretary making such finding shall certify such fact to the President.

* * *

(4) Upon receipt of any certification made under paragraph (1) or (2), the President may direct the Secretary of the Treasury to prohibit

the bringing or the importation into the United States of fish products (if the certification is made under paragraph (1)) or wildlife products (if the certification is made under paragraph (2)) from the offending country for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade.

Notification To Congress

(b) Within sixty days following certification by the Secretary of Commerce or the Secretary of the Interior, the President shall notify the Congress of any action taken by him pursuant to such certification. In the event the President fails to direct the Secretary of the Treasury to prohibit the importation of fish products or wildlife products of the offending country, or if such prohibition does not cover all fish products or wildlife products of the offending country, the President shall inform the Congress of the reasons therefor.

Importation Of Fish Products From Offending Country Prohibited

(c) It shall be unlawful for any person subject to the jurisdiction of the United States knowingly to bring or import into, or cause to be imported into, the United States any fish

products or wildlife products prohibited by the Secretary of the Treasury pursuant to this section.

APPENDIX C

PACKWOOD - MAGNUSON AMENDMENT 16 U.S.C §1821(e)(2).

(A) For the purposes of this paragraph --

(i) The term "certification" means a certification made by the Secretary [of Commerce] that nationals of a foreign country, directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling. A certification under this section shall also be deemed a certification for the purposes of section [8(a) of the Fishermen's Protective Act of 1967 (22 U.S.C. 1978 (a))].

(ii) The term "remedial period" means the 365-day period beginning on the date on which a certification is issued with respect to a foreign country.

(B) If the Secretary issues a certification with respect to any foreign country, then each allocation under paragraph (1) [§ 201(e)(1), 16 U.S.C. § 1821(e)(1)] that --

(i) is in effect for that foreign country on the date of issuance; or

(ii) is not in effect on such date but would, without regard to this paragraph, be

made to the foreign country within the remedial period;

shall be reduced by the Secretary of State, in consultation with the Secretary, by not less than 50 percent.

APPENDIX D

PROPOSED PACKWOOD AMENDMENT TO THE PACKWOOD-MAGNUSON AMENDMENT REJECTED BY HOUSE-SENATE CONFERENCE COMMITTEE, AND ACCOMPANYING LETTER OF CONGRESSMAN FASCELL, CHAIRMAN, HOUSE COMMITTEE ON FOREIGN AFFAIRS

Sec. 301. Section 201(e)(2)(A)(i) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1821(e)(2)(A)(i)) amended by inserting the following immediately after the first sentence thereof: "Any nation whose nationals conduct commercial whaling operations during or after the 1985/1986 pelagic whaling season or the 1986 coastal whaling season, unless such whaling has been authorized by the International Whaling Commission, shall be deemed to be certified for the purposes of this paragraph. Such nations shall also immediately be subject to the sanctions provided by paragraph (B) of this paragraph as soon as the Secretary has determined that such commercial whaling operations are being conducted.".

Sec. 302. Section 8(a) of the Fishermen's Protective Act 1967 (22 U.S.C. 1978(a)) is amended by adding at the end thereof the following:

"(5) A certification under this section which results from matters relating to whaling shall also be deemed a certification for purposes

of section 201(e)(2) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1821(e)(2)).".

Congress of the United States
Committee on Foreign Affairs
House of Representatives
Washington, D.C. 20515

September 6, 1984

The Honorable Mervyn M. Dymally
U. S. House of Representatives
Room 1717 Longworth House Office Building
Washington, D.C. 20515

Dear Merv:

Thank you for your recent letter and copies of your letter to Secretary of State George Shultz and recent statement from the Congerssional Record.

I appreciate your concern regarding the possibility that U.S. legislation would increase the severity of sanctions under the Magnuson Fishery Conservation and Management Act. My understanding is that the amendment proposing such sanctions was defeated in the House-Senate Conference on S. 2463, and that the Department of State opposed that amendment.

I am asking Peggy Galey of the Committee staff to follow-up on this matter with your office.

With best wishes, I am

Sincerely yours,

/s/Dante

Dante B. Fascell
Chairman

APPENDIX E

EXCERPT FROM TRANSCRIPT OF THE TREATY NEGOTIATIONS OF THE INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING

Statement of R. Kellogg, Smithsonian Institution Archives, Record Unit 7165, International Whaling Commission, 1930-1968 Records, Box 9

[Dr. Remington Kellogg presented the United States position as follows (emphasis added).]

The delegation of the United States of America wishes to present the following observations concerning the establishment of a permanent commission of the regulation of whaling for the consideration of the Conference.

The Government of the United States of America favors in principle the eventual establishment by international agreement of a *standing committee with powers to make recommendations* regarding minimum lengths of whales, quotas, lengths of seasons, protected species, sanctuaries, and notification of take, such recommendations to become effective upon approval by the governments parties to the agreement. As the delegates are aware, this is the plan followed in various fishery treaties to which the Government of the United States of America is a party and which it has under consideration. *The advantages of*

this plan, whereby regulations are proposed by an expert international committee on the basis of scientific research and are put into effect by approval of each of the governments concerned, over the present method of a new treaty for each change or amendment, are obvious, particularly in view of the necessity for submitting each new treaty of this type to the United States Senate, with the resulting delays and burdens of dealing with administrative routine placed upon that body.

While this Government would, therefore, give favorable consideration to the establishment of an effective administrative machinery *for modifiying in specified minor respects* the terms of the international agreements on regulation of whaling, *it is not prepared at the present time to enter into any agreement for the establishment of an international commission having powers to modify the terms of agreements without the governments concerned having an opportunity to consider and approve or reject such suggested modifications before they become effective.* This Government would not under present conditions be disposed to empower any such commission to make regulations which would become effective without reference of such regulations to the several parties to the agreement for the approval prior to entry into effect.